No. 12,477

IN THE

United States Court of Appeals

For the Ninth Circuit

MARY ZELLMER, as Administratrix of the Estate of Orval Zellmer and MARY ZELLMER, an Individual,

Appellant,

vs.

ACME BREWING Co., a Corporation,

Appellee.

Appellant's Closing Brief

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The Appellee's contentions are three in number (page 4, Brief for Appellee). These contentions will be answered in the order there set forth.

1. Appellee's First Contention That the Action for Wrongful Death Was Properly Dismissed Because the Nevada Time Limitation Is Procedural Only, Is Advanced by Appellee Without Supporting Authority.

This contention rests almost entirely upon the case of *Gregory v. Southern Pacific Co.* (9th Cir. 1907), 157 Fed. 113. Appellee argues that: (1) The Nevada limitation is

identical to the limitation contained in California Code of Civil Procedure 340(3), and that (2) *Gregory v. Southern Pacific Co., supra,* an Oregon Federal case has construed California Code of Civil Procedure 340(3) as procedural in nature, and that (3) this Court is therefore bound to hold that the Nevada limitation is procedural in nature.

Appellee's basic premise is erroneous. The California limitation considered in the *Gregory* case is significantly different from the Nevada limitation under consideration here, as is demonstrated by the *Gregory* case itself; and secondly, the nature of the Nevada limitation is a question to be answered by resort to Nevada law and the intent evidenced by the Nevada legislature in enacting the limitation. Since there are no Nevada decisions on this point, this Court is free to decide for itself the question as to what the Nevada legislature intended.

Moreover, *Gregory v. Southern Pacific Co., supra,* far from supporting Appellee's contention, is in fact persuasive authority for Appellant's position. This was an action filed in Oregon for a death occurring in California. The action was filed more than one year after the death occurred, but within the time allowed by the Oregon limitation on wrongful death actions. Defendant demurred to the Complaint on the ground that the California time limitation had expired. Relying on the history of the statute, the Circuit Court of Appeals reversed the decision of the trial court which had sustained the demurrer.

The Court traced the history of the California statute emphasizing the fact that the cause of action for wrongful death had originally been enacted, together with the time limitation thereon, by the same statute in 1862 (St. Cal. 1862, p. 447, c. 330).

In 1872 the California legislature enacted the Code of Civil Procedure, and placed the time limitation on actions for wrongful death in Section 339 of the California Code of Civil Procedure grouping, by way of orderly classification, other statutes of limitation in the same chapter. In the form then adopted, the pertinent provisions of the California Code of Civil Procedure read as follows:

> "335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
>
> '339. Within Two Years.
>
> 4. An action to recover damages for the death of one caused by the wrongful act of another.'"

It was that form rather than the present form of the California limitation which was identical in almost all respects to the form of the Nevada limitation now under consideration.

That form of the limitation was left unchanged until 1905. In that year, the legislature amended sections 339 and 340 of the California Code of Civil Procedure (St. Cal. 1905, p. 231, c. 258). This amendment removed the limitation which had been found in Section 339(3), and inserted it in Section 340(3) of the California Code of Civil Procedure, shortening the time within which wrongful death actions could be filed, to one year.

Section 340(3) of the Code of Civil Procedure then read:

> "340. Within One Year:
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction, or for injury to or for the death of one caused by the wrongful action or neglect

of another, or by a depositor against a bank for the payment of a forged or raised check."

This change was considered by the court in the *Gregory* case as a very significant one, in that it destroyed the limitation as one *which stood alone in a class by itself,* and lumped it together in a single subsection with the limitations applicable to seven other actions. The court states (at page 115 of 157 Fed.):

"Under this limitation were conjoined other actions, such as for libel, slander, and the like, *whereas the action for death through the wrongful act of another had formerly stood as a single cause in its own class.** It may be said that the change was brought about by simply dropping this cause of action out of section 339, prescribing the limitation of two years, *and inserting it, among other causes, in section 340, prescribing a limitation of but one year.*"

The court recognized the basic rule set forth in Appellant's Opening Brief. That rule has been uniformly applied, and in fact its application was recently extended in the *Maki* and *Calvin* cases (see pp. 8-13 Appellant's Opening Brief). In stating the rule, the court quoted from *Boyd v. Clark* with approval, saying (at page 116 of 167 Fed.):

"Reduced to a rule, the doctrine was stated by Mr. Justice Brown, late of the Supreme Court, while a District Judge, as follows:

'That where a statute gives a right of action unknown to the common law, and either in a proviso to the section conferring the right, *or in a separate section,* limits the time within which an action shall be brought, such limitation is operative in any other jur-

*Emphasis supplied throughout unless otherwise indicated.

isdiction wherein the plaintiff may sue.' Boyd v. Clark (C.C.) 8 Fed. 849, 852."

It is clear that it was the 1905 amendment when considered with the prior history of the limitation, which compelled the court to decide that the nature of the limitation had been changed. The amendment of 1905 was, indeed, "the straw that broke the camel's back." The court stated (at page 119 of 157 Fed.):

> *"The setting part of the limitations clause out of the old statute,* the eradication of the idea of a proviso in relation to it, its arrangement under the ordinary statutes of limitations, along with the limitations as to the commencement of other actions and causes, *and the subsequent treatment of the specific subject by transferring it from the limitation of two years and classifying it with the one-year limitation, is cumulatively so persuasive as to exclude the thought that it was to be still the purpose of the Legislature that the limitation should stand as a condition to exercising the right of action at all."*

A comparison of this limitation and its history with the Nevada limitation and its history shows that the Nevada legislature has evidenced a directly opposite intent. Appellee erroneously states throughout its argument that the Nevada limitation is identical to the California limitation considered by the *Gregory* case. Quite the contrary is true. The Nevada limitation is, however, identical in structure and arrangement to the California limitation *prior to 1905.*

The history of the Nevada cause of action and its limitation is as follows: The original cause of action for wrongful death was created in 1871 (St. Nev. 1871, p. 90). No specific limitation was established at that time. Instead,

the cause of action was controlled by a *general limitation* established in 1861, which did not mention a cause of action for wrongful death at all (St. Nev. 1816, p. 29). As the cause of action was originally created, therefore, the limitation was procedural in nature.

The *present* cause of action with which we are here concerned was enacted in 1911 as a part of the *present*[1] Civil Practice Act (Sts. Nev. 1911, Nev. Comp. Laws, Sec. 9194). In place of the former *general* limitation which had existed for the old cause of action, the legislature established, as a part of the same act, the present *specifically directed* limitation. The statutory history of the Nevada limitation is, accordingly, exactly the reverse of the California limitation.

Although our position is that, regardless of its history, the present form of the Nevada limitation is clearly such as to make it substantive in nature, the history of the limitation removes all doubt on this subject. The court in the *Gregory* case held the California limitation to be procedural because of its history of change in character from *specific to general.* It is clear, therefore, that the *Gregory* court would have held the Nevada limitation substantive because of its history of change in character from *general to specific.*

Appellee does not challenge the validity of the general rule that a time limitation on a cause of action for wrongful death is substantive in nature in either of two situations: (1) Where the limitation is contained in a proviso attached to, or incorporated in, the section of the statute

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1. There have been three Civil Practice Acts of Nevada (St. Nev. 1861, p. 314; St. Nev. 1869, p. 196, and the present Act of 1911).

creating the cause of action, and (2) where the limitation is contained in a different section of the same statute, but is directed specifically to the cause of action for wrongful death. Appellee merely seeks to abolish by its own argument, without support from judicial precedent, the second half of this well recognized rule.

Appellee concludes its argument on this point by stating (at page 12, Brief for Appellee):

> "If appellant's argument were at all sound, it would necessarily follow that *all* of the limitations periods of the Act were substantive, since they are in the 'same Act' as the actions to which they refer."

It is a sufficient answer to such an argument to point out that the problem *arises* only with relation to those causes of action which were unknown to the common law, and which were created in the first instance by statute.

The balance of the authorities cited by Appellee provide no more support for its first contention that does the *Gregory* case. The first of these cases in *Anderson v. Linton* (7th Cir. 1949), 178 Fed. 2d 304 (at p. 7, Brief for Appellee). It is true that the Court held an Iowa statute of limitations to be procedural in nature. In doing so, however, it accepted and applied the general rule advanced by Appellant. The court stated (at page 310 of 178 Fed. 2d):

> *"Thus, if the original statute for wrongful death still existed in Iowa, and that statute contained a two-year period of limitation, the action could be brought within that period in the State of Illinois, Coffman v. Wood, D.C.N.D. Ill., 5 F. Supp. 906."*

The Iowa statute involved did not even faintly resemble the Nevada limitation here under consideration. The limi-

tation was construed as applying to actions for wrongful death although it did not even mention those actions. Section 614.1, Iowa Code, 1946, states:

> "614.1 (3) *Injuries to person or reputation—relative rights—statute penalty—setting aside will.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given, provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall contain the name of decedent, the date of his death, the court in which and the date on which the will was probated, together with a copy of said will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service."

The next decision cited by Appellee (at p. 7, Brief for Appellee), is *Hughes v. Lucker* (3rd Cir., 1949), 174 Fed. 2d 285. This was a suit filed in the Federal court in Pennsylvania for a death occurring elsewhere. The decision does not purport to determine the question here at issue. The court merely pointed out that the Supreme Court of Pennsylvania had already decided the *exact* question, and that the Federal courts of Pennsylvania were therefore bound, without regard to what was thought of the wisdom of the Pennsylvania court's decision. The case accordingly is no authority at all with regard to the instant problem since this Court is not bound by a prior decision of a California court, and is free to decide the question for itself.

The last case cited (at p. 7, Brief for Appellee) is *Keys v. Pullman Co.* (D.C., Tex., 1949) 87 Fed. Supp. 763. This was a suit for wrongful death filed in the Federal District Court in Texas for a death occurring in Pennsylvania. The Pennsylvania statute on actions for wrongful death (12 Purdons Penn. St., Sec. 1603) was as follows:

> "Section 1603. Statement of parties to be made in declaration.
>
> 'The declaration shall state who are the parties entitled in such action; *the action shall be brought within one year after the death, and not thereafter.'* "*

The court stated (at page 765 of 872 Fed. Supp.):

> *"The trend of decision and perhaps the weight of authority in the Federal Appellate Courts is that the above italicized wording in Section 1603 is not an ordinary Statute of Limitation, but that it conditions plaintiff's right of action.* But I think the weight of authority in the Appellate Courts of Pennsylvania is that it is only an ordinary Statute of Limitation."

The court was thus bound by Pennsylvania decisions construing the Pennsylvania statute as procedural only. The case offers no support for Appellee's contention since there is no Nevada decision similarly construing the Nevada limitation here involved.

It can thus be seen that the first of Appellee's contentions (p. 4, Brief for Appellee) is completely unsupported by authority. In contrast, Appellant's position in this regard is amply supported by judicial precedent. Indeed, the *Maki* case and the *Calvin* case (pp. 8-11, Appellant's Opening Brief) held limitations to be substantive in nature which were far *less* specifically directed to the causes of action limited than is the Nevada limitation. *Appellee cites*

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*Court's emphasis.

no contrary authority whatsoever. It merely asserts that those cases were in error and attempts to fill the gap with a statement of its own opinion.

2. Appellee's Second Contention Is Based on the Erroneous Assumption That a California Rule Has Been Established Which Is Binding on This Court.

Appellee relies entirely on the case of *Engel v. Davenport* (1924) 194 Cal. 344, wherein the California Supreme Court attempted to apply sec. 340(3) of the California Code of Civil Procedure to a suit for personal injuries brought in California under the Employers Liability Act. Appellee concedes in a footnote (p. 16, Brief for Appellee) "* * * that the *result* of this case was reversed in 271 U.S. 33, 70 L. Ed. 813, on the ground that this was not a case involving conflict of laws * * *" and then produces its "of course" argument,[2] saying that "* * * the case does, *of course,* state the California rule applicable to conflicting state laws, over which rule the U.S. Supreme Court has no authority."

The fact that the case was reversed by the Supreme Court of the United States seems to trouble Appellee not at all. The very fact of its reversal should be a sufficient answer to Appellee's argument that it represents controlling authority.[3]

There are, however, other reasons why *Engel v. Davenport, supra,* does not control the decision of this Court. First of all, the action was for personal injuries, while the present action is for wrongful death. Since a cause of

2. The "of course" argument defies classification. It is seemingly a device whereby one clothes one's own opinion with an appearance of authority when unable to find judicial precedent in point.

3. *Ruppert v. Ruppert* (App. D. C., 1943) 134 F.2d 497.

action for personal injuries existed at common law, the California limitation would have applied in the absence of a Federal statute *regardless* of rules of Conflict of Laws. In cases of wrongful death, however, the cause of action did not exist at common law, and a completely different principle governs the application of time limitations.

Secondly, the remarks of the Supreme Court in *Engel v. Davenport, supra,* were *obiter dicta,* and as such, are entitled to no weight in the instant case. The California court completely misconceived the legal issues involved in the *Engel* case, as is shown by the decision of the Supreme Court of the United States *(Engel v. Davenport* [1925] 271 U.S. 33, 46 S.C. 410, 70 L. Ed. 813), which reversed the decision of the California court. The case involved only the following questions: (1) Did the Employers Liability Act incorporate the two-year limitation on suits provided by the Merchant Marine Act? (the Employers Liability Act does not itself contain a statute of limitation); and (2) if so, could a state court disregard that limitation, and apply instead a limitation provided by a state statute?

The Supreme Court of California answered the first question negatively. In so doing, it disposed of the case. The Supreme Court of the United States held that the California court was wrong. Even had the California Supreme Court been correct in its holding, the problem here at issue could not have been involved since it is settled that where a Federal statute gives a cause of action without providing a limitation thereon, the limitation of the state where enforcement is sought will *always* be applied.[4]

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4. *Hanger v. Abbot* (1867) 73 U.S. 532; 6 Wall. 532; 18 L.Ed. 939; *Amy v. City of Dubuque* (1878) 98 U.S. 470, 25 L.Ed. 228;

The California court would have completely disposed of the case by its answer to the first question irrespective of whether its answer was in the affirmative or negative. After erroneously answering it in the negative, however, the court stated (at page 350 of 194 Cal.), "Conceding, however, for the sake of argument * * *," and then proceeded with its dictum as to a Conflict of Laws rule. This situation is identical to that considered in the case of *Hargrove v. Henderson* (1930) 108 C.A. 667. The court, in discussing the effect of the case of *Peabody v. Phelps* ([1858] 9 Cal. 213) stated (at page 676 of 108 Cal. App.):

> "The only question upon the point involved in the case of *Peabody v. Phelps* was whether or not an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate could be maintained by the purchaser * * * and it was decided that such action would not lie but that the purchaser must bring his action for breach of the covenants in his deed. It is true that the learned justice who wrote the opinion in that case, *after thus concluding that the purchaser was restricted to an action for breach of the express warranties contained in his deed, took occasion to discuss, at considerable length, the question as to the right of a vendee who had taken a deed without express warranties of title,* to maintain an action for fraud and deceit, and concluded that under such circumstances, such vendee would be without remedy, *but, as heretofore noted, such question was not involved in the case,* and the *discussion of same* in the opinion *and the conclusion drawn* may be regarded as pure *dictum.** In view of this fact, we do not regard the decision in

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Caldwell v. Alabama Dry Dock & Shipbuilding Co. (5th Cir. 1947) 161 Fed.2d 83; cert. den. 68 S.Ct. 59, 332 U.S. 759, 92 L.Ed. 345; *Williamson v. Columbia Gas & Elect. Corp.* (3rd Cir., 1939) 110 Fed.2d 15; cert. den. 60 S.Ct. 1087, 310 U.S. 639, 84 L.Ed. 1407.

*Court's emphasis.

the *Peabody v. Phelps* case *as in any way controlling,* nor even as authority in the case at bar."

The case of *Childers v. Childers* (1946) 74 C.A.(2d) 56 also considers same point. The court stated (at page 61 of 71 C.A.(2d)):

> "It is a fundamental rule of that doctrine (stare decisis) that a decision is not authority for what is *said** in the opinion but only for the points *actually involved** and actually decided. (*Norris v. Moody,* 84 Cal. 143, 149 (24 P. 37); *Hart v. Burnett,* 15 Cal. 530, 598.) The rule of *stare decisis* is a rule of public policy. For the preservation of harmony and for the stabilization of the law the courts will ordinarily follow precedents when the same points arise in subsequent litigation, although they will not persist in an absurdity or perpetuate a manifest error. There is no kinship between *stare decisis* and *obiter dictum.* Whatever may be said in an opinion *that is not necessary to a determination of the question involved is to be regarded as mere dictum.* (*Cardenas v. Miller,* 108 Cal. 250, 252 (39 P. 783, 41 P. 472, 49 Am. St. Rep. 84).) *The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed."*

Moreover it is settled that Federal courts do not follow dicta of state courts. *(DeLong v. Jefferson Standard Life Insurance Co.* [5th Cir. 1940] 109 Fed.2d 585; cert. den. in 60 S.Ct. 1081, 310 U.S. 635, 84 L.Ed. 1022; *New England Mutual Life Insurance Co. v. Mitchell* [4th Cir. 1941] 118 Fed.2d 414; cert. den. in 62 S.Ct. 60, 314 U.S. 629, 86 L.Ed. 505; 28 U.S.C.A. § 725).

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*Court's emphasis.

In the *Mitchell* case, for example, the court stated (at page 420 of 118 Fed.2d):

> "In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established stare decisis rule and its limitations. Cf. *West v. American Tel. & Tel. Co.*, 61 S.Ct. 179, 85 L.Ed. ..... We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we *surrender our own judgment as to what the local law is on account of dicta* or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, *where there has been no decision on the precise question before us,* is to consider that question in the light of the common law of the state, *with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it.* To base a decision upon dicta, or upon *speculation as to what the local court might decide in the light of dicta,* would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

This court should similarly refuse to be influenced by a dictum expressed twenty-five years ago which is contrary to the rule followed by Federal courts.

The *Engel* case was reviewed in 13 California Law Review 411, and the fallacy of the court's reasoning on Conflict of Laws discussed. The author deplored the court's refusal to follow the "Federal rule" and concluded (at p. 414 of 13 Calif. Law Review):

> "The purpose of the statute of limitations is to prescribe a time within which to bring the action; this is

so whether the limitation and the right arise from one statutory enactment or whether they arise from separate unconnected enactments; *and the same is true whether the period prescribed by the statute, of the foreign jurisdiction, creating the right is shorter than the period prescribed by the law of the forum, or whether it is longer than such period.* Can it be said that it is any more in contravention of the policy of the forum, or any more inconvenient for its courts, to enforce the limitation in the one case than in the other? The practical result of the situation is that the court of the forum *gives the defendant all the defenses he could have had in the courts of the foreign jurisdiction, while it does not give the plaintiff all the advantages which he would have been given in those courts,* and one of which is the privilege of bringing the action any time within the prescribed period. *Neither the reasons for the general rule, as already outlined, nor any principle of law demand such a result as this."*

Appellant does not dispute the fact that there are decisions in state courts, other than those of California, which refuse to apply the substantive time limitation of the *lex loci* when the law of the forum provides a shorter limitation. The better rule, however, is the one which Federal courts apply when not bound by state decisions. The annotation (68 A.L.R. 217) relied upon by Appellee (beginning p. 22, Brief for Appellee) itself points out this division among state decisions. Appellee merely quotes the writer's own personal views. Perhaps the latest and most complete collection of authorities on this point is set forth by the case of *Lewis v. Reconstruction Finance Corporation,* (App. D.C. 1949) 177 2d 654 (p. 17, Appellant's Opening Brief). The court recognized the two lines of au-

thority but in applying the rule contended for by Appellant, stated (at page 655 of 177 Fed. 2d):

> "In dealing with this conflict of authority, unaided by any decision of this court *directly in point,* we conclude that the limitation laid down by the law of the state where the fatal injuries occurred should govern, unless the public policy of the forum is clearly opposed. *We think this view is better supported by reason and authority.*"

3. Appellant Ignores the Question of Statutory Construction, Which Is the Only Question Involved in Appellant's Claim for Her Own Personal Injuries.

A brief restatement of Appellant's position with regard to the statute of limitation applicable to a cause of action for personal injury resulting from breach of warranty seems therefore appropriate. In the first place, Appellant does not contend that the cause of action for personal injuries arising by reason of a breach of warranty is either *ex contractu* or *ex delicto.* Whether this cause of action is contractual or tortious in nature is simply immaterial. The question is one of statutory construction alone. Appellee does not dispute the fact that Section 339(1) of the California Code of Civil Procedure is the *general* statute of limitations in this state, and that it limits *both contractual and tortious* causes of action, so long as they are not removed from it scope by *specific provision* elsewhere.

Appellee's extensive arguments, which deal almost entirely with the question of whether or not the cause of action for Appellant's personal injuries is tortious or contractual in nature, are therefore immaterial.

Contrary to Appellee's assertion (page 28, Brief for Appellee), Appellant's contention has *never* been considered

by a California court. None of the cases cited by Appellee are applicable to this situation. The case of *Automobile Insurance Co. v. Union Oil Company* (1948) 85 C.A. 2d 302, does, however, deserve comment. The question there involved was whether or not a suit for property damage occurring by reason of defendant's breach of an implied warranty, was covered by California Code of Civil Procedure, Section 338(2), or by California Code of Civil Procedure, Section 339(1). The court held quite logically that the former section was applicable. California Code of Civil Procedure, Section 338 states:

> "§ 338. Within three years:
>
> 2. An action for trespass upon or injury to real property."

The contrast between this section and the limitations on personal injuries provided by California Code of Civil Procedure, Section 340(3) is highly significant. Whereas Section 338(2) covers *all* injuries to real property, without limitation, Section 340(3) covers those actions for personal injuries "* * * *caused by the wrongful act or neglect of another* * * *". The difference in legislative intent is apparent. The limitation on actions for personal injuries contained in sec. 340(3) is very clearly limited to those produced in a specified manner, whereas the limitation on causes of action for damage to real property is not so limited. The *Automobile Insurance Company* case therefore is not authority for the proposition that the legislature intended, by the *enactment of Section 340(3)*, to withdraw actions for personal injury arising without fault or neglect of the defendant, from the broad general scope of California Code of Civil Procedure, Section 339(1).

CONCLUSION

Appellee has failed to meet Appellant's arguments and authorities. In lieu of producing authorities to the contrary, Appellee has attempted to substantiate its otherwise unsupported arguments by devices such as its "of course" argument. We know that this Court will not be misled by such tactics and respectfully submit that justice will be done only by forcing Appellee to stand trial on the merits, both as to the claim for wrongful death, and as to the claim for Appellant's personal injuries.

Dated: San Francisco, Calif.,
May 31, 1950.

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